

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Application of SBC Communications, Inc.)	
Pursuant to Section 271 of the)	
Telecommunications Act of 1996 To Provide)	CC Docket No. 01-194
In-Region, InterLATA Services in Arkansas)	
and Missouri)	

**COMMENTS OF THE MISSOURI
OFFICE OF THE PUBLIC COUNSEL**

The Missouri Office of the Public Counsel recommends that the Federal Communications Commission (FCC) deny SBC Communications, Inc.'s refiled Section 271 application for interLATA service authority in Missouri. SBC withdrew its original application when it appeared that the application failed to address key questions of compliance with Section 271 as raised by the U.S. Department of Justice and the staff of the FCC. The major response taken by SWBT was to lower some Missouri UNE prices to meet concerns that Missouri prices were significantly higher than the prices in other SWBT states (Texas, Oklahoma and Kansas). However, a disparity in prices still exists. To obtain approval of its Section 271 application in Arkansas, SWBT reduced its Arkansas prices to the Kansas prices. But SWBT did not offer to provide parity with these neighboring states even though costs between the states did not differ enough to reflect such a difference in pricing. Missouri prices remain higher than these two SWBT

neighboring states. Reducing selected Missouri prices still did nothing to address the question about the lack of justification for the disparity in prices. Missouri CLECs and, in turn, Missouri consumers are placed at a disadvantage compared to CLECs in neighboring states.

The Office of the Public Counsel affirmatively requests that its prior filings from CC Docket 01-88 be incorporated into the record of this new docket. Public Counsel reaffirms its positions and statements in those comments and in its comments made in support of the Department of Justice evaluation.

Public Counsel still believes that the FCC is faced with a deficient and incomplete record upon which to make its findings. The present MO PSC record does not present findings on the key matters that were cited by the FCC and SBC at the time SWBT withdrew its Missouri application. As indicated in the June 7, 2001, Statement of FCC Chairman Powell on the withdrawal of SBC's Section 271 application, "concerns surfaced related to cost-based pricing in the region and operations support systems (OSS)." (FCC news media release, June 7, 2001) The FCC requested SWBT to answer a number of questions about DSL provisioning, wholesale discounts for the resale of advanced services, line splitting arrangements, and wholesale pricing in Missouri as compared to Oklahoma, Kansas, and Texas, among other topics. SWBT needed extra time to respond and so it pulled the plug on the application to stop and reset the statutory 90-day clock for FCC action.

The Missouri PSC record is incomplete and does not consider all the relevant evidence that the FCC needs for its review. The PSC did not require SWBT to submit to it all the additional information SWBT submitted to the FCC after March 15, 2001 (the

date of the PSC's order approving the Section 271 application). The PSC did not direct SWBT to file with the PSC all information SWBT intends to submit to the FCC to respond to the issues and concerns raised by the FCC and the DOJ. By not requiring SWBT to file this evidence, parties such as Public Counsel did not have an adequate opportunity to challenge or respond to such evidence in a state evidentiary proceeding.

The U.S. Department of Justice's May 9, 2001 Evaluation of Southwestern Bell's application cited its reservations about the application and the Missouri Public Service Commission record in support of it. The evaluation pointed to the virtual absence of competition in the residential market or in business via the UNEs or the UNE-platform and raised the concern that Southwestern Bell's failure to carry out its obligations under the Act may be the cause. (DOJ Evaluation, p. 6-7).

The DOJ criticized pricing in Missouri. It said rates adopted by the Missouri Public Service Commission from the state arbitration cases (TO-97-40 and TO-98-115) appear to be excessive compared to other states' approved rates. It reported that cost differences between the states do not explain this disparity. The Department of Justice said that the Public Service Commission record suggests that the rates do not reflect the proper application of the TELRIC methodology and that the Missouri Public Service Commission approved the application using an excessive number of interim rates. The Justice Department also had concerns about Southwestern Bell's commitment and its record of reselling advanced services as required under Association of Communication Enterprises v. FCC, 235 F3d 662 (D.C. Cir. 2001). Many of these Department of Justice concerns were also raised by the FCC. Public Counsel filed comments in support of the Department of Justice Evaluation in the first SBC Missouri Section 271 application.

The concerns and questions raised by the FCC and the DOJ should first have been addressed by the Missouri Public Service Commission. The MO PSC declined to hold further evidentiary hearings after SBC's withdrawal of its application. The company refiled its petition at the FCC without making any supplemental record at the Missouri PSC.

This process by-passed the orderly system of state regulatory body fact-finding and recommendations that was adhered to in the past. The FCC repeatedly stated in its prior orders that under Section 271, Federal Telecommunications Act of 1996, the applicant is required to make its evidentiary record before the state regulatory body so that when the issues reaches the FCC, it has a full and complete record together with the state recommendation.

In its order approving SBC's Texas application, the FCC said:

We will look to the state to resolve factual disputes wherever possible. Indeed, we view the state's and the Department of Justice's roles to be similar to that of an "expert witness." Given the 90-day statutory deadline to reach a decision on a section 271 application, **the Commission does not have the time or the resources to resolve the enormous number of factual disputes that inevitably arise from the technical details and data involved in such a complex endeavor.** *Memorandum Opinion and Order, In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Company, And Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas, (CC Docket No. 00-65), June 30, 2000 (FCC Texas Order), (para. 51) (emphasis added)*

In the Order rejecting BellSouth's South Carolina application, the FCC emphasized the importance of the state commission record:

"On the other hand, we emphasize that **parties should make every effort to present their views to the state commission in the first instance, where such views can be adequately addressed by other**

interested parties and subjected to cross-examination. para. 27
(emphasis added) *Memorandum Opinion and Order, In the Matter of Application of BellSouth Corporation, et al Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In South Carolina*, CC Docket No. 97-208 (December 24, 1997).

The public statements of FCC Chairman Powell and Southwestern Bell officials indicate that the evidentiary record left open factual and other questions concerning Southwestern Bell's compliance with Section 271. Chairman Powell said that "concerns surfaced" about OSS and cost-based pricing in SWBT's region that lead SWBT to withdraw. In a statement announcing the withdrawal dated May 24, 2001, SBC Senior Vice-President Pricilla Hill-Ardoin said: "We have worked closely with the Commission to respond to questions regarding very complicated operations systems, as well as compliance with a recent federal appeals court decision. These are issues which the FCC and SBC are addressing for the first time." The record before the Missouri PSC upon which this refiling is based does little to nothing to shore up the deficiencies in the prior record. SWBT's reduction of some Missouri prices does not answer those open questions. While it closes the gap to some extent in the disparity of prices, it fails to provide solid justification for the deviation in prices.

SWBT stated to the Missouri Public Service Commission that as a result of the FCC staff review and comments, "SWBT has made a decision to voluntarily reduce certain of the rates established by the Commission in Case No. TO-97-40 in order to allay any lingering concerns regarding the TELRIC basis of those rates and to obtain Section 271 relief." (SWBT Motion To Accept Revised Missouri Interconnection Rates, p. 2, para. 3) SWBT further stated at paragraph 6 of its motion: "Nevertheless, SWBT has

determined that it would be appropriate to reduce those rates as described above in order to allay any lingering concerns and to obtain Section 271 relief.”

The controversy over these reductions in rates is not whether these reductions should be made, but rather why did it take so long to make these reductions and why not reduce all rates to the lowest level approved in any of the SWBT region states (Texas, Oklahoma, Kansas, Arkansas).

In an oral presentation made by SWBT on August 16, 2001, the PSC was presented with the virtually accomplished refiling of SWBT’s Section 271 at the FCC. The company advised the PSC at the session on Thursday, August 16th that it would go back to the FCC on the next Monday, August 20th. SWBT’s oral presentation to the PSC was the company’s substitute for the production of a sworn evidentiary record to demonstrate to the PSC and the FCC that it has resolved all the questions raised by the DOJ and the FCC staff. SWBT did not advise the PSC at the presentation that the refiling would also be in conjunction with the Arkansas application. The PSC should have been told of that companion filing given the reductions made to the Arkansas A2A. (Tr. 3411)

SWBT’s major response to FCC and DOJ concerns with its pricing was to make certain reductions. Upon questioning by the MO PSC, it was apparent that these price reductions did not bring Missouri to a par with the lowest rates approved in other SWBT states. Although SWBT still proclaimed that its original prices were correct and that the PSC approved prices were below its TELRIC prices, it voluntarily reduced some of its wholesale prices to below its costs to gain entry into the interLATA long distance market and to offer all services on a bundled basis. (Tr. 3403; 3404-3406). The revised M2A price structure is a new fact in the application. Another new set of facts are the prices

offered by SWBT in Arkansas in the A2A which then was incorporated into a companion application at the FCC on August 20th. (Tr.3411) It is apparent that the linkage of TELRIC costs to SWBT's wholesale prices has been abandoned as an operative factual consideration by SWBT. SWBT is willing to cut its prices, even below its costs, just to gain entry into the interLATA marketplace as soon as possible. Entry into the interLATA market is the overwhelming concern, not the just and proper pricing of its facilities. The question then becomes, why should Missouri CLECs and Missouri customers not benefit from the lowest price offered for the same services in the SWBT region. If SWBT readily abandons its argument that it cannot accept less than its TELRIC prices for the expediency of gaining a state commission's and the FCC's approval of its application, then Missouri should obtain the best deal possible---parity in price with the other SWBT region states. (Tr. 3391-2, 3397-3399)

In addition, Public Counsel is concerned that this reduction made solely to gain entry would be short-lived. Another real fear is that SWBT may recoup its revenue by looking to retail prices and passing the burden directly onto the consumer. At present SWBT is seeking competitive status for all its services in Missouri which would give the company totally flexibility to increase or decrease consumer prices as it sees fit. *In the Matter of the Investigation of the State of Competition in the Exchanges of Southwestern Bell Telephone Company*, (TO-2001-467)

Public Counsel suggests that the public interest standard is not satisfied in this application. As time passes, the ability for effective competition in the local exchange market in SWBT's territory seems to grow dimmer. SWBT placed obstacles in the path of effective competition by forcing CLECs to engage in a two year struggle to gain the

ability to offer the PSC's Optional Metropolitan Calling Area Plan to CLEC customers on the same basis as SWBT offers the plan to its customers. SWBT impeded competition by failing to follow PSC directives making its Local Plus IntraLATA wide flat rated calling plan available for resale to CLECs and IXC's until again ordered to do so by the PSC.

A case is now pending at the MO PSC on the status of competition, not only for local exchange service in SWBT's territory, but also for all telecommunication services in each SWBT exchange. According to the testimony filed to date, the outlook for real and effective competition in the local market is not good. *In the Matter of the Investigation of the State of Competition in the Exchanges of Southwestern Bell Telephone Company*, TO-2001-467. This evidence strongly suggests that there is an absence of effective competition in the local exchanges of SWBT in the state.

According to information from SWBT regarding CLEC access lines, Public Counsel believes that the most accurate representation of CLEC market share in Missouri is at best 5% state-wide on a combined business and residential basis and combined resale, facilities-based, and pure facilities based method of competition. For just a comparison of business and residential on a combined basis, residential CLEC customers are only 3.72% of SWBT's residential access lines and 20% for business. When looking at purely facilities based CLECs, residential is only 1.19% and business 9.8%. For partial facilities based CLECs, business is only 14.64% of SWBT's access lines and 1.44% of residential. While market share is not a conclusive factor, it has significant bearing on the level of competition and on the satisfaction of the public interest standard.

Residential competition in SWBT exchanges is virtually non-existent, with the bulk of the competition in this sector coming from prepaid local providers who serve the niche market of high risk customers who have no credit history, credit problems or are unable or unwilling to meet the credit requirements to obtain SWBT local service. Competition for local business customers, to the extent it exists at all, lies primarily with the high-end volume user in the central zones of the St. Louis and Kansas City metropolitan areas. The whole spectrum of the business community from multi-national headquarters to Mom and Pop operations is not served by effective competition. There exists the very real prospect of premature entry of a local monopoly company into the intraLATA long distance market. This is the evil, which all economists have cautioned would defeat effective competition in the telecommunications market and harm the consumer. This would defeat the intent and purpose of the Federal Telecommunications Act of 1996 and all the intended benefits to consumers. The facts at hand show that this unfortunate situation is a real and imminent possibility with the pending SBC Missouri application. This outcome can be avoided.

The FCC should act with deliberation and based on a full and complete record made at the MO PSC with the opportunity for all parties to test the evidence. The FCC should demand that a clear and convincing justification for discrimination in the treatment of Missouri CLECs and Missouri consumers as compared to neighboring states Public Counsel does not believe such a justification can be made. Finally, the FCC needs to take a hard look at the status of competition in Missouri, not just the compliance with the 14 point checklist, to weigh the detrimental impact approval of this application will have on the public interest by allowing premature entry of SWBT into the

interLATA long distance market while it holds of virtual monopoly in local exchange service

Conclusion

For the foregoing reasons, the Missouri Office of the Public Counsel asks the Federal Communications Commission to deny the application.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed or hand delivered this 10th day of September, 2001 to the attorneys of record listed:

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